No. 22216

In the

United States Court of Appeals

for the Ninth Circuit

AMERICAN SMELTING & REFINING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition to Review and Set Aside an Order of the
National Labor Relations Board

Brief of Petitioner
American Smelting & Refining Company

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JURISDICTION

(A) The National Labor Relations Board.

Local Union 13886, International Union of District 50, United Mine Workers of America (Ind.), (hereinafter referred to as "Union") filed its charge against the American Smelting & Refining Company (hereinafter referred to as "Petitioner") with the National Labor Relations Board (hereinafter referred to as "Board") on September 30, 1966, being Case No. 28-CA-1435. (T.R. 3). Thereafter a complaint issued which alleged that the Petitioner, since on or about

July 22, 1966, and thereafter, had refused to bargain with the Union by unilaterally increasing the cost of company housing, doing so without first notifying and/or bargaining with the Union, in violation of Section 8(a)(5) of the National Labor Relations Act (hereinafter referred to as the "Act"), Section 158(a)(5), Title 29, U.S.C.A. It was alleged in paragraphs 12 and 14 of the complaint that the Petitioner initiated an increase in the rents of the company homes at the Silver Bell, Arizona, townsite, without prior notice to or bargaining thereon with the Union in violation of Sections 8(a)(5) and (1), and Section 2(6) and (7) of the Act, Sections 158(a)(5) and (1) and 152(6) and (7), Title 29, U.S.C.A., respectively.

Petitioner's answer admitted that the Petitioner increased the rent for its two and three bedroom houses, but denied that said subject was a mandatory subject of collective bargaining. (T.R. 8). A hearing before the Board was held on January 17, 1967, in Tucson, Arizona, before the trial examiner. Subsequent to the hearing, both Petitioner and the Union submitted legal briefs to the trial examiner for consideration and after that the trial examiner rendered his decision on May 19, 1967. (T.R. 11). The trial examiner found that the Petitioner was in violation of Sections 8(a)(5) and (1) of the Act, Section 158(a)(5) and (1) Title 29, U.S.C.A. Thereafter, Petitioner filed its exceptions to the trial examiner's decision (T.R. 27) and a supporting brief, whereupon the Union filed cross-exceptions (T.R. 36) and a supporting brief, and the respondent filed a brief in reply to the Union's cross-exceptions. Pursuant to the provisions of Section 3(b) of the Act, as amended, Section 153(b), Title 29, U.S.C.A., the Board delegated its powers in connection with this case to a three-member panel. The Board reviewed the rulings of the trial examiner made at the hearings and found that no prejudicial error was com-

mitted. The Board considered the trial examiner's decision, exceptions and briefs, and the entire record and adopted the findings, conclusions and recommendations of the trial examiner with modifications. (T.R. 39).

The National Labor Relations Board's jurisdiction rested upon the authorization contained in Section 160, Title 29, U.S.C.A.

(B) This Court.

The Board, on August 24, 1967, entered a final order (T.R. 39) as the result of which Petitioner is an aggrieved party, and its interests adversely affected. The decision and order of the Board is designated as 167 N.L.R.B. No. 26. In its decision and order of August 24, 1967, in the foregoing case, the Board found that the trial examiner had not committed any prejudicial error in his decision and the Board affirmed the rulings of the trial examiner and adopted the findings, conclusions and recommendations of the trial examiner in the trial examiner's decision, with certain modifications noted in the Board's order.

The Board ordered Petitioner to cease and desist from: (1) Refusing to bargain collectively with the Union with respect to proposed changes in housing and apartment rentals at the Petitioner's Silver Bell, Arizona, operation; (2) unilaterally increasing rental charges of company housing at Silver Bell, Arizona, without prior notification to and bargaining with the Union; and (3) in any like or related manner interfering with the efforts of the Union to bargain collectively on behalf of the employees in the bargaining unit.

The Board further ordered the Petitioner to affirmatively: (1) Bargain collectively with the Union, upon request, as the exclusive representative of all its employees renting

said company housing with respect to any changes, now in effect or hereafter proposed, in rentals charged employees at company-owned housing and trailer parking areas at Petitioner's Silver Bell, Arizona facilities; (2) immediately reinstate the rental charges in effect prior to the unilateral increase thereof at Silver Bell, Arizona and make whole, with interest at 6% per annum, all the employees in the bargaining unit who have paid the increased rental charges; and (3) post notices stating Petitioner would not refuse to bargain collectively with the Union as the exclusive representative of all the employees in the bargaining unit with respect to any changes in rentals charged for Petitioner's company-owned housing and trailer parking areas at Petitioner's Silver Bell, Arizona facility. Petitioner filed its petition for review of the Board's decision and order of August 24, 1967, with this court on September 26, 1967. (T.R. 43). Petitioner's statement of points and designation of record were also filed on September 26, 1967. (T.R. 54). The Board subsequently filed an answer to the petition and also filed a cross-petition for enforcement of its order. (T.R. 52).

The jurisdiction of this court as to the petition for review is conferred by Section 160, Title 29, U.S.C.A.

STATEMENT OF THE CASE

Petitioner is a mining company which, as part of its Arizona operations, maintains a copper mine, crusher and concentrator at Silver Bell, Arizona, approximately forty miles northwest of Tucson, Arizona. Located near the mine is a townsite in which the Petitioner owns one hundred ninety-nine (199) dwelling units and fifty (50) trailer spaces. Of the one hundred ninety-nine (199) dwelling units, one hundred seventy-five (175) are two(2) and three(3) bed-

room houses, and twenty-four (24) are two and three bedroom apartments. As of October 12, 1966, Petitioner employed three hundred seventeen (317) persons at the Silver Bell location. Two hundred eight (208) employees lived in company housing and one hundred nine (109) lived elsewhere. It is not a requirement that the employees live at the townsite. The Petitioner maintains the townsite and pays all utilities. It also pays for garbage and trash collection. From the time when the company housing was first occupied in 1952, until September, 1966, the rent did not change. The amount which was to be charged for monthly rent was unilaterally determined by the Petitioner, and the Union at no time ever overtly claimed that it had a right to be consulted as to the amount to be charged as rent. At no time during this period did the Union attempt to interfere with the operation of the housing in any manner. The complete operation of the company housing was left solely to the discretion of the Petitioner, who made all decisions unilaterally as to its maintenance and operation. In September, 1966, the Petitioner unilaterally increased the rent on two (2) bedroom houses by five dollars ($5.00) per month, and on the three (3) bedroom houses by ten dollars ($10.00) per month. Rent on the apartments and trailer spaces remained unchanged. When the Petitioner raised the rent on the two (2) and three (3) bedroom houses, the Union protested, maintaining that the rent charged for company housing was a mandatory subject of collective bargaining, within the meaning of Sections 8(a)(5) and 8(d) of the Act, Sections 158(a)(5) and 8(d), Title 29, U.S.C.A. Petitioner maintained that it was not.

The hearing before the trial examiner was held on January 17, 1967, in Tucson, Arizona. At the commencement of this hearing, certain stipulations as to factual matters in-

volved were read into the record. Those stipulated facts which Petitioner feels are pertinent to the presentation of its argument are:

(1) Each occupant of a house, apartment or trailer space enters into a formal lease with Petitioner. (R.T. 9).

(2) The first labor agreement between Petitioner and the Union at Silver Bell, Arizona, was concluded on December 15, 1954, and was for a two (2) year duration. (R.T. 11).

(3) Additional labor agreements were negotiated in 1956, 1959, 1961, 1962 and 1964. The expiration date set forth in the current labor agreement is September 30, 1967. (R.T. 11).

(4) No employee of the Petitioner is required to live at Silver Bell, Arizona as a condition of his employment. (R.T. 12).

(5) As of October 12, 1966, Petitioner had three hundred seventeen (317) employees at its Silver Bell unit, of which fifty-three (53) were salaried employees and two hundred sixty-four (264) were bargaining unit employees. (R.T. 12).

(6) As of October 12, 1966, one hundred seventy-five (175) of the bargaining unit employees lived in company housing and eighty-nine (89) of the bargaining unit employees lived at locations other than Silver Bell, Arizona. (R.T. 12).

(7) Employees who do not live at Silver Bell, Arizona, whether salaried or bargaining unit employees, are paid at the same rate of pay as employees who live at Silver Bell, Arizona for their respective occupational classifications. There is no travel allowance paid to employees who do not live at Silver Bell. (R.T. 13).

(8) On July 22, 1966, Petitioner, by letter to each tenant, notified the tenants of the two-bedroom houses that their rent would be increased by five dollars ($5.00) per month

effective August 1, 1966, and the tenants of the three-bedroom houses that their rent would be increased by ten dollars ($10.00) per month effective August 1, 1966. No rental increases were made effective as to the apartment units or the trailer spaces. (R.T. 13-14).

(9) The Union thereafter requested negotiations concerning the Petitioner's action and a meeting was called by the Petitioner for August 17, 1966, at which meeting Petitioner told representatives of the Union that it would not bargain about its decision to increase the rents. Representatives of the Union told Petitioner not to withhold any more money from employees' pay without getting authorizations therefor. At this meeting the effective date of the rent increase was changed to September 1, 1966. (R.T. 15).

(10) The Petitioner's townsite at Silver Bell, Arizona, is approximately forty (40) miles from Tucson. The maintenance of the residences and townsite is performed by Petitioner's maintenance employees. The rents are paid by payroll deduction and all present occupants have authorized, in writing, payroll deduction for rent. (R.T. 16).

(11) Petitioner owns and operates a mine, crusher and concentrator known as the Mission Unit, approximately twenty (20) miles southwest of Tucson. There are no housing units at the Mission Unit. Wages for comparable occupational classifications at Petitioner's Mission Unit are the same as, or slightly lower than, those at Petitioner's Silver Bell operation. No travel allowance is paid to employees of Petitioner at the Mission Unit. (R.T. 19).

SPECIFICATION OF ERRORS RELIED UPON

I

The Board erred in finding Petitioner guilty of a refusal to bargain collectively with the Union, as the exclusive representative of all the employees in the bargaining unit, with respect to any changes in rentals charged for Petitioner's company housing and trailer parking areas at Silver Bell, Arizona, in violation of Sections 8(a)(5) and (1) of the Act, as amended by the Taft-Hartley Act, Section 158(a)(5) and (1), Title 29, U.S.C.A., for the reason that there was insufficient evidence in the record presented to show that the rental of the company's houses, apartments and trailer spaces at the Silver Bell, Arizona, site was a mandatory subject of collective bargaining under Sections 8(a)(5) and 8(d) of the Act, Sections 158(a)(5) and 8(d), Title 29, U.S.C.A.

II

The Board erred in finding Petitioner guilty of a refusal to bargain collectively with the Union, as the exclusive representative of all the employees in the bargaining unit. with respect to any changes in rentals charged for Petitioner's company housing and trailer parking areas at Silver Bell, Arizona, in violation of Sections 8(a)(5) and (1) of the Act, Sections 158(a)(5) and (1), Title 29, U.S.C.A., for the reason that the record failed to show that rental of company owned housing, occupied by employees and non-employees alike, constituted wages and/or other conditions of employment, pursuant to Sections 8(a)(5), 8(d) and 9(a) of the Act, Sections 158(a)(5) and 158(d) and 159(a), Title 29, U.S.C.A., respectively.

ARGUMENT

The Respondent Erred in Finding Petitioner Guilty of a Refusal to Bargain Collectively with the Union, as the Exclusive Representative of All of the Employees in the Bargaining Unit, with Respect to Any Changes in Rentals Charged for Petitioner's Company Housing and Trailer Parking Areas at Silver Bell, Arizona, in Violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as Amended by the Taft Hartley Act, for the Reason That There Was Insufficient Evidence in the Record Presented to Show That the Rental of Company Houses, Apartments and Trailer Spaces at the Silver Bell, Arizona Site Was a Mandatory Subject of Collective Bargaining Under Section 8(a)(5) and 8(d) of the Act, Sections 158(a)(5) and 158(d) Title 29, U.S.C.A.

At the hearing before the trial examiner in this case, the burden of proof was upon the General Counsel to show, by a preponderance of the evidence, that the rental of company houses by the Petitioner to its employees was a "condition of employment" or that the rent charged was of such a nature as to constitute an "element of wages". If the General Counsel failed to prove one of these then there were no violations of Sections 8(a)(5) and (1) of the Act, Sections 158(a)(5) and (1), Title 29, U.S.C.A., and the trial examiner should not have rendered a decision against the Petitioner, and the Board should have found that the Act had not been violated.

A review of pertinent parts of the record emphasizes the fact that the Union had not seen fit in the past to interfere in any aspect of the operation of the company housing. Mr. Albert W. Avenetti, the first of two witnesses called by the Union (R.T. 31) was first employed by Petitioner in 1954 for seven (7) months (R.T. 34) then again in 1956-57 for approximately seventeen (17) months (R.T. 34), and for a third time in 1959 up until he went on the staff of the Union in October of 1965. For approximately five (5) years prior

to October, 1965, Mr. Avenetti lived in Silver Bell in a three bedroom house. (R.T. 34). While employed by Petitioner in 1956 he did not live at the townsite, but in Tucson. (R.T. 35). Mr. Avenetti testified that in 1956 he held a position as recording secretary with the Union and was also on the negotiating committee, and that he participated in the negotiations in 1956. (R.T. 41). Mr. Avenetti testified that at these negotiations a Mr. Sabatino, an International Representative and chief negotiator of the Union, "wanted it clarified and in that respect assurance from the company that rents would not be increased so as to off-set any increase in pay that might be arrived at from negotiations." (R.T. 41). He further testified that at the 1959 negotiations the rental of property was again brought up when Mr. Avenetti (at that time President of the local union) asked Mr. Jameson for a reassurance that the rent would not be increased, and that Mr. Jameson gave him such reassurance. (R.T. 43). Then again, in the 1961 and 1962 sessions, Mr. Avenetti testified, the company reassured the Union, upon being asked for such reassurance by the Union, that the rent would not be increased, but that the Petitioner would not give a letter to that effect or enter it into the contract. (R.T. 43). Mr. Avenetti also testified that in the 1964 negotiations Mr. Jameson again conceded, under questioning by the Union, that the rents would not be increased. (R.T. 44). But on cross-examination, Mr. Avenetti was asked by counsel for Petitioner if he ever gave an affidavit to anyone regarding the instant matter, to which Mr. Avenetti replied that he had given one to Mr. Roy Garner of the Board. (R.T. 55). The affidavit was then produced and through extensive cross-examination as to the contents of this affidavit, counsel for Petitioner elicited from Mr. Avenetti that the only statement included in the affidavit by Mr. Avenetti was that

supposedly made by Mr. Purvis in 1956, but that Mr. Avenetti had made *no* mention in his affidavit of the statements which Mr. Avenetti testified were made by Mr. Jameson in 1959, 1961, 1962 and 1964. (R.T. 52-55). It seems strange to Petitioner that Mr. Avenetti would have failed to include these important facts in his affidavit made for this instant case and then later testify that such statements were made by Mr. Jameson. Because this affidavit was introduced and admitted in evidence (R.T. 57) for the purpose of determining the credibility of the witness' testimony, it should be seriously considered in determining whether or not any such statements were ever actually made by Mr. Jameson. It appears they were not or Mr. Avenetti would surely have included them in the affidavit which he furnished in connection with the investigation and preparation of the case. This is further emphasized by the fact that Mr. Avenetti made handwritten additions, by way of interlineation to this affidavit, at the time of signing, *but at no time included the prior conversations at the bargaining table when Mr. Jameson supposedly stated that the Company would not increase the rent!*

Grave doubts are also cast on the testimony of Mr. Avenetti after reading the testimony of witnesses called by the Petitioner. Mr. Robert B. Meen testified that he is presently the Southwestern Manager of the Mining Department of Petitioner and was assigned to the Silver Bell mine from 1952 through July of 1959 as chief engineer, mine superintendent and superintendent. (R.T. 66). He testified that he had sat in on all negotiating sessions up until July, 1959. (R.T. 66). Mr. Meen also testified that he was present at the 1956 negotiations and that he had no recollection of Mr. Sabatino asking Mr. Purvis for assurance that rent at Silver Bell would not be increased

nor that Mr. Purvis ever stated that the rents would not be increased. (R.T. 67). This testimony is directly opposed to that of Mr. Avenetti. Mr. Meen's further testimony, unrefuted, showed that the Union never performed any overt act indicating it desired to bargain with the Petitioner concerning the company housing operations. Because of the importance of these statements, Petitioner will quote the applicable portions.

R.T. 70, lines 6-13:

"Q. (By Mr. Boland) Mr. Meen, in participating at the bargaining for Silver Bell has there ever between the parties been any discussion of a tie between wage rates and the rental at the housing facilities?

A. *I recall none.*" (Emphasis supplied)

R.T. 72, lines 12-25:

"Q. Mr. Meen, at any anniversary negotiating meeting which you participated in has the union ever submitted any demand which related to any aspect of the operation of the townsite?

A. I recall none.

Q. That would include rentals and services provided; is that correct?

A. That is correct.

Q. *At any anniversary negotiations, whether there were any demands submitted or not, have the two parties ever bargained about any aspect of the operation of this townsite?*

A. *We have never bargained about aspects of the townsite.*

Q. *That includes rentals, services provided and everything else; is that right?*

A. *That is right.*" (Emphasis supplied)

Mr. Meen further testified that for a considerable period of time before 1957 the mining at the Silver Bell site was contracted out to Isbell Construction Company and that the

Isbell employees occupied about 50 per cent of the company houses (R.T. 73) with Petitioner's employees occupying the balance, but that there was no distinction in the rent charged to Isbell employees as compared to Petitioner's employees. (R.T. 74).

Mr. Russell Salter was called as a witness by Petitioner. (R.T. 80). Mr. Salter has been the mill superintendent at Silver Bell for approximately eleven years and was assistant superintendent prior to that time. (R.T. 81). From the time the Union was originally organized until the present Mr. Salter participated in the anniversary negotiations. (R.T. 81). He too had no recollection of the conversation between Mr. Sabatino and Mr. Purvis with reference to the rent not being increased at Silver Bell. (R.T. 82). He further testified at *R.T. 82, lines 9-24:*

> "Q. Have you had occasion to review the union demands every year?
>
> A. Yes.
>
> Q. Has there ever been an occasion when the union submitted a written proposal with reference to the housing or any aspect of the housing?
>
> A. I do not recall any at all.
>
> Q. Are you familiar with whether or not the company ever made any written proposals to the union?
>
> A. To my knowledge they have never made any.
>
> TRIAL EXAMINER: *With regard to that same question that counsel just asked you, were any oral or spoken proposals made that you heard of with regard to rental?*
>
> THE WITNESS: *No, I do not recall any of them.*
>
> TRIAL EXAMINER: *Written or oral?*
>
> THE WITNESS: *As to written or oral."* (Emphasis supplied).

This testimony further discredits that given by Mr. Avenetti, and it supports the testimony of Mr. Meen that no

statements were made at the negotiations regarding increase in rent of the company houses.

The final witness called by the Petitioner was Mr. Donald R. Jameson, presently superintendent of the Silver Bell Unit. (R.T. 84). Mr. Jameson participated in the 1959, 1961, 1962 and 1964 anniversary negotiations between the Petitioner and the Union. (R.T. 85). When asked by counsel for Petitioner as to whether Mr. Avenetti specifically asked Mr. Jameson in 1959 for an assurance that the rent at the Silver Bell Unit would not be increased, Mr. Jameson testified that he recollected no such question or answer of that nature. (R.T. 85).

In further repudiation of Mr. Avenetti's testimony, Mr. Jameson testified at *R.T. 85, line 23 to R.T. 87, line 4:*

"Q. Do you remember any questions at that time or in those negotiations concerning the rental of houses?

A. No.

Q. If I were to ask you the same question with reference to 1961 or 1962, in whatever year they were held, what would your answer be?

A. The same thing.

Q. And if I were to ask you the same question about Mr. Avenetti's testimony with reference to 1964, what would your answer be?

A. The same.

Q. Have you participated in negotiations in each year before 1964?

A. Before 1959?

Q. Including 1959?

A. Yes.

Q. Did you receive any written proposals during each of these years?

A. Yes.

Q. In any one of these years did the union submit a proposal in any way related to the rental or the operation, or any aspect of the townsite?

A. No.

Q. *Did the company at any time ever submit a proposal, verbal or written, relating to its operation of the townsite?*

A. *No.*

Q. *Did the union at any time during any negotiation ever submit any kind of a verbal proposal with reference to the rents or other operations at the townsite?*

A. *Not to my knowledge.*

Q. *At any time in any negotiation, Mr. Jameson, has there ever been anything relating rental to wages negotiated between the parties?*

A. *No.*" (Emphasis supplied)

Mr. Jameson further testified that in none of the documents given to the men when they were hired was there a mention of the housing available, (R.T. 95) nor were the men in any way advised or made aware of the company housing when they were hired. (R.T. 84).

The only directly concerned person who has not come forward and denied Mr. Avenetti's testimony about events occurring during negotiations is Mr. Purvis, who, as was brought out during the cross examination of Mr. Avenetti, is dead. (R.T. 53).

From a review of the evidence thus far, it is crystal clear that the Union did *not,* by a preponderance of the evidence, show that the Union performed a single act since it obtained bargaining rights in 1954 to show that it desired to bargain collectively with the Petitioner regarding any aspect of the operation of the company housing. No objection was raised when the Petitioner permitted "outsiders" to live in the homes throughout the years on an equal rental basis. The quoted testimony also shows that although collective bargaining regarding the company houses might have been

considered at many of the negotiating meetings as a permissive subject of bargaining and incorporated in the written agreements, that such was never brought in by the Union officials. Therefore, as to this aspect of proof the Union failed to meet its burden of proof.

The Respondent Erred in Finding Petitioner Guilty of a Refusal to Bargain Collectively with the Union, as the Exclusive Representative of All the Employees in the Bargaining Unit, with Respect to Any Changes in Rentals Charged for Petitioner's Company Housing and Trailer Parking Areas at Silver Bell, Arizona, in Violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as Amended by the Taft Hartley Act, for the Reason That the Record Failed to Show That Rental of Company Owned Housing Occupied by Employees and Non-Employees Alike, Constituted Wages and/or Other Conditions of Employment, Pursuant to Sections 8(a)(5), 8(d) and 9(a) of the Act, Sections 158(a)(5), 158(d) and 159(a), Title 29 U.S.C.A.

The evidence further proves that the rent charged was not of such a nature as to constitute an element of wages. The term "wages", as used in Section 9(a) of the Act, Section 159(a), Title 29, U.S.C.A., "embraces within its meaning direct and immediate economic benefits flowing from the employment relationship." *W. W. Cross & Co. v. National Labor Relations Board,* 174 F.2d 875, 878 (C.A. 1, 1949). It is Petitioner's firm contention that the General Counsel failed to show, in any way whatsoever, how there was any direct and immediate economic benefit flowing from the Petitioner to the employees as the result of the rental of the company housing. The stipulated facts included previously herein show that those employees living on the premises received the same pay as those living elsewhere. (R.T. 13). Furthermore, Mr. Meen and Mr. Jameson both testified that since the inception of the townsite, persons other than employees of Petitioner have been per-

mitted to live in the company houses, and that the rent has been the same for everyone. Actually, prior to 1957, half of the housing was occupied by persons who were not employees of Petitioner and during those years, as now, the non-employees paid the same rent as employees. (R.T. 73, 74). There was absolutely no evidence presented that the employees paid less rent than they would have if they lived in similar houses in the surrounding or nearby communities, nor was there any evidence presented as to what would be a surrounding community of which a comparison could be made. The only attempt to show comparable rentals for houses was the Union's Exhibit No. 8 for identification, which purported to be portions of the classified section of the July 22, 1966, and August 26, 1966, editions of *The Arizona Daily Star,* which the Trial Examiner ruled was complete hearsay, and thus inadmissible. (R.T. 31-33). Counsel for the General Counsel then attempted, through Mr. Avenetti's testimony, to establish a comparison of the rent in Tucson, Arizona, in relationship to the rent at Silver Bell (R.T. 36-39), but, upon objection by counsel for Petitioner, the Trial Examiner ruled this testimony to be completely irrelevant to the issue and that Mr. Avenetti was not an expert capable of testifying about prevailing rates of rent of comparable houses in different areas. (R.T. 39). The General Counsel called as a witness Mr. Wayne Anderson, presently employed by Petitioner and now the president of the local union. (R.T. 59). Mr. Anderson testified that there were two other communities closer to the Silver Bell location than Tucson, these being Marana and Cortaro, both approximately 25 miles from the Silver Bell townsite. Mr. Anderson disclosed that six (6) employees were then living in Marana and two (2) in Cortaro, (R.T. 63); that both were just small communities of private homes, businesses and schools. (R.T. 63). The Union never attempted to establish

the prevailing rental rates for similar dwellings in these two communities, which would certainly have been the most logical thing to do to establish the Union's case. These two towns were much closer than Tucson to Silver Bell and presumably the living conditions would have been more similar to Silver Bell than those in Tucson. Since there were employees living in these two towns already, it is apparent that homes were available. The only conclusion that can be reached as to this point is that the Union failed to carry the burden of establishing that the prevailing rental rates in the surrounding communities were more than those at Silver Bell for comparable housing.

Furthermore, if the rent for these homes were to constitute "wages" there would have to be consideration flowing to the employer from the employees for the benefits received by the employees, for it is primary that wages must in some way be earned by the employees. Again, the record is devoid of evidence that Petitioner benefited in any way from the company housing other than through a landlord-tenant relationship. In fact, the record shows that none of the employees were required to live in the company houses, nor could the Petitioner compel the employees to live in the houses. The testimony of the Union's witnesses clearly showed this. Compare the cross-examination testimony of Mr. Anderson, (R.T. 64, line 21 to R.T. 65, line 3) which also includes the Union's stipulation on this point:

> "Q. When you moved into Tucson was it your own choice to do so?
>
> A. Yes, it was.
>
> Q. Is it not correct, Wayne, that there is no requirement that any employees live in Silver Bell, requirement made by the company, I mean?
>
> Mr. Harris: I will stipulate to that. It is cumulative."

The General Counsel earlier attempted to show benefits derived by the Petitioner from having employees live in company housing through testimony by Mr. Anderson about a maintenance man living at Silver Bell who was given a certain emergency job to perform, which should have been given to another employee living in Tucson. (R.T. 60). Mr. Anderson testified that the employee who was living in Silver Bell, and who was asked to assume the emergency task, was *working on the job at the time the emergency arose.* (R.T. 60, lines 8-12). Therefore, whether or not he was living at Silver Bell was entirely irrelevant, and the trial examiner so ruled. (R.T. 62).

The evidence also proved that the fact that Petitioner rented company houses to the employees did not in any way affect the wage scale at the Silver Bell operation, but instead established that the wages at Silver Bell followed the ordinary wage pattern for large mining companies. Counsel for Petitioner offered Petitioner's Exhibit No. 2 for identification, which was the then current labor agreement between Pima Mining Company and the Union representatives. (R.T. 68). It was offered for the purpose of showing that there is no differential between the wage rates at Silver Bell and at Pima Mining Company. Further, the Pima Mining Company property is 23 miles southwest of Tucson and there are no housing facilities at Pima, which would be evidence that no variance in the pay scale exists by reason of the fact that Silver Bell offers housing to its employees while Pima does not. (R.T. 69). Further testimony elicited from Mr. Meen on this aspect was to the effect that Silver Bell's anniversary date is always some months later than the anniversary dates for the other copper producers in the district. (R.T. 70). When asked how the wages at Silver Bell were determined, Mr. Meen declared, *R.T. 71, line 8 to R.T. 72, line 11:*

"A. Well, the pattern has been mostly set by other companies and we more or less follow along with them.

Q. When you say other companies do you mean large copper companies in the state?

A. Yes.

Q. Are some of these companies which have no housing?

A. That is right.

Q. And some of them which are in remote areas; is that right?

A. That is right.

Q. And all of them . . . strike that.

Although some of them that are in remote areas do, in fact, have housing; is that right?

A. I believe so, yes.

Mr. Harris: Mr. Trial Examiner, I am going to object to this line of questioning. We are here to determine not the way the employer bargains and why he bargains the way he does but what he has not bargained about, which we contend is a proper matter for bargaining, and we don't see how this testimony is relevant to that issue.

Trial Examiner: Overruled.

Q. (By Mr. Boland) Does Pima have housing on its property?

A. I don't believe they do have.

Q. It has been testified it is about 23 miles southwest of Tucson; is that right?

A. That is right.

Q. To your knowledge, is a travel allowance paid to Pima employees for traveling between Tucson and Pima?

A. Not at the present time."

Mr. Meen further testified that at none of the anniversary negotiations between Petitioner and the Union did the Union submit any demand relating to any aspect of the operation

of the townsite, including rentals and services provided. (R.T. 72).

A stipulation in the record which was accompanied by the Union's Exhibit No. 7 for identification (R.T. 19) further supports Petitioner's contention that the rentals of the company houses played no role in wage rate determination at Silver Bell. The stipulation is that Petitioner owns another similar operation called the Mission Unit, about 20 miles southwest of Tucson; that there are no housing units there; and that "[W]ages for comparable occupational classifications at Respondent's Mission Unit are the same or slightly lower than those at Respondent's Silver Bell Operation. No travel allowance is paid to employees of Respondent at the Mission Unit." (R.T. 19, lines 14-18). The Union's Exhibit No. 7 for identification, admitted in evidence without objection (R.T. 28) was a copy of the agreement between the Mission Unit officials and the Unions having representation rights at the Mission Unit.

No other evidence was brought forward by the Union to show any benefit to the Petitioner through rental of the company housing. The only conclusion that can be drawn from the evidence produced was that there was purely a landlord-tenant relationship, and that because the circumstances had not changed up to the time of this hearing, the relationship was also the same. Furthermore, in *National Labor Relations Bd. v. Bemis Bro. Bag Co.,* 206 F.2d 33, 37, (C.A. 5, 1953), a case on "all fours" with the instant case, the Court, in considering whether such rentals would be classified as "wages" under the statute, declared:

> " 'Wages' may be a direct or indirect compensation or emolument for the work performed. If it is shown that rentals are so low that they are in fact a partial compensation such rentals would properly fall within the statutory requirement. In such a case, as said in

> N.L.R.B. v. Hart Cotton Mills, 4 Cir., 190 F.2d 964, 972, in many mills such houses are a necessary part of the enterprise and where they are maintained by the employer and 'rented at such rates to the employees as to represent a substantial part of their remuneration' they become a subject of bargaining."

The Court in *Bemis,* supra, held that the evidence did not prove that the rentals constituted "wages". The evidence herein fails to establish this also. There was no evidence to show that the rentals were so low that they would constitute partial compensation, nor that such houses are a necessary part of the enterprise. The record fully supports this position. With a lack of such necessary evidence, it cannot be found that such rental constituted "wages" under the Act.

The final question that must be answered is whether the Union proved that the rental of the company houses constituted "other conditions of employment" under Section 9(a) of the Act, Section 159(a) Title 29, U.S.C.A. This issue was also considered in *National Labor Relations Bd. v. Bemis Bro. Bag Co., supra.* In said case, the respondent bag company informed its employees that it intended to restore rentals of its houses to the 1949 rate, to which the union protested, declaring that the matter of rentals and occupancy of such houses was a mandatory subject of collective bargaining. The respondent employer contended that, *under the circumstances,* the matter solely concerned a landlord and tenant relationship which it considered a non-bargainable issue. Only two witnesses testified, the respondent's assistant general manager for the respondent, and one of respondent's employees for the union. The trial examiner found the facts insufficient to establish that the housing condition was a matter of mandatory bargaining, thus the respondent had not refused to bargain with the union in good

faith and recommended dismissal of the complaint. The Board, basing its determination on its belief that the terms and conditions of company housing were *ipso facto* a subject of mandatory bargaining, found that respondent's refusal to bargain concerning the housing rentals was a violation of Section 8(a)(5) of the Act, Section 158(a)(5), Title 29, U.S.C.A. The Court of Appeals, in denying the Board's petition for enforcement, held, p. 35:

> "We find the record *insufficient in facts* to authorize the Board's conclusion in this case." (Emphasis supplied)

The pertinent facts submitted to the Court and applied by the Court in reaching its decision were that the respondent owned a plant site approximately two miles from Talladega, Alabama. Around the plant were located dwelling units, a dairy farm, a garage and filling station, a library, grocery store, school and recreational facilities. There were 195 houses containing approximately 295 to 300 dwelling units. Of a total of 750 to 900 union employees, approximately 325 to 340 lived in company houses and occupied about 250 of the 300 dwelling units. The Court further found, at pp. 35-36:

> *"The remaining units, except for those rented by two ministers who serve the village, and by the manager of the retail store located in the village, are rented to clerical and supervisory employees of the company. Thus all units are leased to employees except for the ministers and the store manager.* Approximately 65% of the employees in the bargaining unit live outside the village. They either own their own homes, or are renting from landlords other than the respondent. The houses involved rent from $13.25 for a two-room unit to $25.50 for a six-room unit. *The record fails to show whether these rentals are more or less than those charged for comparable houses in the vicinity rented by others."* (Emphasis supplied)

There was a waiting list of approximately 80 applicants. The plant was served by the public transportation, but a survey showed that only 48 out of more than 1,000 employees utilized such means of transportation, the remainder traveling in private automobiles.

Giving a general definition of "conditions of employment" under Section 9(a) of the Act, Section 159 (a), Title 29, U.S.C.A., the Court stated, pp. 36-37:

> "The language of the statute, which requires bargaining with 'respect to wages, hours, and other terms and conditions of employment,' § 8(d), or in 'respect to rates of pay, wages, hours of employment, or other conditions of employment,' § 9(a), clearly contemplates matters and things which arise out of, and may properly be considered a part of, the employment relations,—the business in which the employer and the employee participate *as necessary and essential components in the furtherance of the enterprise. The Act contemplates the relationship in the work of the enterprise and the engagement of the employer and employee in its prosecution.* Conditions under which this employment is, or should properly be, carried on, including those generally accepted as provisions proper to the discharge of the mutual obligations of the employer and employees, or even those which might be deemed fairly debatable which relate to the actual business operation, are within the provisions of the statute as 'conditions of employment.'" (Emphasis supplied)

Remarking about whether rental of company houses comes under "conditions of employment" the Court reasoned, p. 37:

> "* * * *It is true, of course, that living standards and conditions may well be said to have a direct connection with a person's well being and efficiency, but this does not establish that an employee's living expenses or means of residence are conditions of employment.* Indeed, if so, it would seem to result that no matter where,

or how, the employee lived such items, or means of securing them, would be conditions of employment and they would apply as well to the two-thirds of the respondent's employees who do not occupy company-owned houses as to the one-third who do.

"It is, of course, true that there are situations where the employee may not have freedom of choice in securing living accommodations. This may result either from express requirement of the employer or where other housing is unavailable and which requires occupancy of company housing if there is to be any employment. Where this situation exists, the terms and conditions of occupancy or tenancy can well be said to be a condition of employment. *However, before such occupancy and its consequences becomes a condition of employment there must be some necessity, either imposed by the employer or by the force of circumstances, which requires the employee to subject himself to the condition of occupancy of company housing.*" (Emphasis supplied)

Applying the above reasoning to the facts of the case, the Court concluded, p. 37:

"In this case the evidence that other adequate housing is available in the community is not contradicted. *There is no evidence that the rentals charged by the respondent are in any degree less than those charged for comparable housing in the vicinity.* In these circumstances the fact that the employer confines the rental of its houses to employees does not alone make the conditions of tenancy a condition of employment, *nor, where there is no compulsion, either by express requirement or resulting in fact from circumstances which in reason require the employee to live in a company house, the conditions of tenancy of such houses which a minority of the employees may, but are not required to, occupy is not a condition of employment within the contemplation or purpose of the statute. The*

element of necessity is of course not material as to features of the employer-employee relationship which inhere in the actual employment,—the carrying on of the business. These concern and relate to the business, the employment, directly, and not incidentally, as does the company housing now for consideration under the facts of this case. One concerns a business operation. The other pertains to living conditions during off-hours when the employee is free to pursue his personal life as he may prefer." (Emphasis supplied)

In concluding, the Court further found, pp. 37-38:

"The brief for the Board recites the genesis and status of the mill village as a necessary adjunct of the mill enterprise. We can recall instances where the village is an essential part of the business operation. *We have in mind others where the company-owned houses have been disposed of and subsequently tenanted by non-employees without any interruption or detriment to the business enterprise. We think each case must be determined upon its particular facts. On this record, which fails to show that rentals are so low as to be partial remuneration for services and, therefore, in effect, wages, or, for any reason save individual choice why one-third of the employees occupy company housing, we are unable to hold that the terms and conditions of such occupancy are comprehended within the statute's designation of 'wages' or other 'conditions of employment.'*

"We find the Board's order without sufficient support in the facts and accordingly deny the petition for its enforcement.

"Enforcement denied." (Emphasis supplied)

The factual circumstances of the instant case could hardly be more similar with *Bemis, supra.* The only distinction of any importance seems to be that in *Bemis* the town was located next to the plant, whereas here the nearest towns

were about 25 miles away and that one-third of the employees occupied the company dwellings in *Bemis* whereas approximately 65% of the employees occupied Petitioner's houses. But the Court does not give emphasis to these points, nor should they be given here. In *Bemis,* the record established that all of the dwellings were occupied by bargaining unit employees, except for a few dwellings occupied by the ministers of the village, the manager of the retail store and the clerical and supervisory employees of the company—the same situation exists in the instant case. In *Bemis,* the record failed to show whether the rentals were more or less than those charged for comparable houses in the vicinity rented by others—the General Counsel failed to prove this point in the instant case also. There was a waiting list in *Bemis*—there is a waiting list here for houses, though no waiting list for apartments. There was no testimony in *Bemis* that homes in other vicinities were not available—there was no testimony to that effect in the instant case. Also, an important distinction, which supports Petitioner's position here, is that in *Bemis* the houses were rented to company employees only, whereas here the testimony is that homes are rented, and in the past have been extensively rented, to "outsiders", which further shows that this was not a condition of employment. The best example of the Petitioner's unilateral action of allowing "outsiders" to rent company houses was its act of permitting Mr. Avenetti to live in a company house for *six to eight weeks* after his employment with American Smelting & Refining Company terminated. (See the stipulation of facts as to Albert W. Avenetti's testimony on cross-examination, which was obliterated on the tape recording of the record in this case.) (T.R. 31) It is stated in the stipulation "That in his later period of employment, i.e., 1959 to October of 1965,

he again lived in a company house at Silver Bell, Arizona: *that when he finally terminated his employment with Respondent in October, 1965, to accept a full time position with District 50, United Mine Workers of America, he was permitted to live in the company house at Silver Bell, Arizona, for a period of six (6) to eight (8) weeks after the termination of his employment, and that during this period of time, after his termination, he continued to pay the same rent which he had paid while he was still an employee of Respondent.*" (R.T. 31). (Emphasis supplied)

National Labor Rel. Bd. v. Lehigh Portland Cement Co., 205 F.2d 821 (C.A. 4., 1953) is the only other case Petitioner has found regarding rent increases of company housing as a mandatory subject of collective bargaining. In that case the Court enforced the Board's order directing the company to cease and desist from refusing to bargain collectively with the Union in respect to the rentals, but the evidence therein was sufficient to justify such a decision, which was not true in *N.L.R.B. v. Bemis Bro. Bag Co., supra,* or in the instant case. The facts were that housing in the area was in short supply, thus a demand for company houses; that rent for the houses was uniformly low; that it was more convenient living nearer to the place of work than the great majority of the employees who lived off of the premises, which created substantial advantages which affected the employees' conditions of employment. The Court granted the Board's order because of this evidence, which is apparent from the last sentence of the opinion, pp. 823-824:

> "*Under the circumstances of this case* the matter is of sufficient importance as to require its submission to the process of collective bargaining." (Emphasis supplied)

If these facts had not been in evidence the Court would have held otherwise. Suffice it to say, none of the relevant and pertinent facts are in evidence in the instant case as were in *Lehigh, supra.* Therefore, the decision in Lehigh cannot be controlling here.

Petitioner believes that the only other Court of Appeals cases which are concerned with the matter of company housing as a subject of mandatory bargaining are *National Labor Relations Board v. Hart Cotton Mills, Inc.,* 190 F.2d 964, (C.A. 4, 1951), and *Kohler Company* and *Local 33, UAW-AFL-CIO, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America* (1960) 128 N.L.R.B. 1062, 300 F.2d 699, cert den. (1962) 370 U.S. 911. In *Hart, supra,* the employer threatened striking employees with loss of employment and eviction from company housing. The case did not involve a proposed increase in the rent for company housing. The Court held that under the facts presented the occupation of company housing was not a mandatory subject of collective bargaining. The Court, by way of dictum, did say that under certain circumstances company housing is a proper subject of collective bargaining; compare p. 972:

> "In many mills such houses are a *necessary part of the enterprise* and in this instance they were *maintained by the employer and rented at such rates to the employees as to represent a substantial part of their remuneration.* (Emphasis supplied)

Again, the Court has set down certain criteria which must be shown to justify collective bargaining, but which have not been proven to exist here. There was no evidence that the Silver Bell houses "were a necessary part of the enterprise" and the great weight of the evidence, brought forth herein, refutes beyond any doubt the contention that these

houses are "maintained by the employer and rented at such rates to the employees as to represent a substantial part of their remuneration." It is crystal clear that the General Counsel failed to meet the Court's standards in determining when company housing is a mandatory subject of collective bargaining.

Kohler, supra, also gives full support to Petitioner's case. Like the *Hart* case, the *Kohler* case involved the eviction of striking employees from company housing. It did not involve a proposed increase in rent for company housing. In the *Kohler* case the company employed some 3,300 employees. The plant was located near a town of 4,500. The company owned a hotel near the plant, and certain employees lived there. After a strike commenced in the plant, the employer asked some of the striking employees living in the hotel to move out due to a "shortage of rooms" for persons "actively employed" by the company. Also the leases on certain dwelling units owned by the Company and occupied by striking employees were not renewed by the employer, striking employees being asked to vacate the premises. After examining the actions of the employer with regard to striking employees occupying company housing, the Board concluded that the occupancy of the hotel was *not* a condition of employment. 128 N.L.R.B. 1188. The most pertinent aspect of the Board's decision was concerning one employee, Faas, who had leased a dwelling and garden plot from the respondent-employer. The Trial Examiner found that Faas' tenancy constituted a condition of employment, basing his finding on the following factors in the record, 128 N.L.R.B. 1092-1093:

> "Faas had worked for the Respondent for 18 years, had rented houses from Respondent for 9 years, and the house for which he received the eviction notice for

5 years. Faas' lease of December 29, 1952, contained the following proviso:

> "This lease is entered into by Lessor *because of the employment by Lessor of Lessee, and for this reason the annual rent is fixed at the sum named herein.* If the Lessee should at any time, voluntarily or involuntarily, quit the service of the Lessor, or decline or refuse to perform the work for which said Lessee is employed, or the Lessor for any reason desires possession of said premises; in either of said events Lessor shall have the right to terminate this lease and reenter upon and take possession of said premises, upon thirty (30) days written notice to vacate said premises, either given to the Lessee in person or by leaving a copy of said notice upon said premises.

"When Faas' lease was renewed for another year in December 1953, the foregoing clause was omitted, although the rental was continued at the same rate of $40 per month. The Trial Examiner found that even though the proviso was taken out of the subsequent lease, as the rent remained the same despite the fact that since December 28, 1952, there had been an average increase in rents, nationwide, of 5.7 percent, Faas' employment continued to enter into the fixing of the rental in the later lease and was therefore inseparably linked with the terms and conditions of his employment.

"The Respondent contends that as the clause was omitted it would be contrary to basic contract construction to hold that although the lease was changed, the parties intended only to accomplish a nullity by making the change, or to find that because all provisions of the lease were not changed the provisions that were changed must be ignored. We find merit in the Respondent's contention. Moreover, the record contains no evidence showing the rents of other tenants, em-

ployee or nonemployee, were increased from 1952 to 1954. Nor does the record show that Faas otherwise received more favorable consideration than other tenants because of his employment by the Respondent." (Emphasis supplied)

When the express employment provision was taken out of the lease the Board found that the condition of employment had vanished and Faas was deserving of no more rights than any other tenant of the employer, *which included "outsiders."* Certainly in the instant case, where no such provision was ever put in the lease, the Board should not have found differently. Also, here, as in *Kohler,* there is no evidence in the record showing any rent increase for anyone, *including nonemployees,* until the present increase. When this present increase occurred it was applied to all tenants, including employees and nonemployees alike. Also, there is no evidence in the record here that employees received "more favorable consideration than other tenants" because of their employment by Petitioner. Again, the record proves that the General Counsel failed to show "a condition of employment" under standards established by the Board decisions as well as Court opinions.

The sole case Petitioner has found which lends any credence at all to the Union's position under the factual situation is *In the Matter of Elgin Standard Brick Manufacturing Company and United Brick & Clay Workers of America, A.F.L.* (1950) 90 N.L.R.B. 1467. Many facts and circumstances of *Elgin* differ from the instant case. In the *Elgin* case the respondent employer owned 59 dwelling units which were rented only to employees. No lease was ever required of the tenants before, and the respondent employer requested that each tenant sign a lease or surrender possession of the premises. The record does not state how many employees

worked for the company or how many employees were in the bargaining unit. Neither does the record state where the housing was located, whether there was a waiting list for company housing, whether a town was nearby, whether there was public transportation to a nearby town, or whether vacant housing was available in the vicinity of the plant. Furthermore, *Elgin,* decided July 28, 1950, did not have *National Labor Relations Board v. Bemis Bro. Bag Co.,* 206 F.2d 33, (C.A. 5, 1953) as a guide, which now it presumably would follow. It is apparent that with the scant facts in the *Elgin* case, confronted with the *Bemis* decision, the Board erred by ruling the same way without more substantial facts in evidence upon which to base its decision. It is highly debatable today that the Court of Appeals would enforce the Board's order in *Elgin.* There would not be an adequate record to show that, by a preponderance of the evidence, counsel for General Counsel had sustained its burden of proof.

It is elementary that the burden of proof in an unfair labor practice proceeding rests upon the General Counsel, *Cedar Rapids Block Co. v. National Labor Relations Board,* 332 F.2d 880 (C.A. 8, 1964). A review of the record shows that there is a complete failure of proof of the 8(a)(5) and (1) charges embodied in the complaint. This failure of proof should have caused the Board to find Petitioner innocent of the charges, for, as stated in 31 *Am Jur., LABOR,* § 299, p. 627:

> "Board orders must be based upon 'the preponderance of the testimony taken.' "

This burden is carried only when the General Counsel proves the charges by a preponderance of the evidence; *Falstaff Brewing Corp.* and *Oscar Gerak* (1960) 128 N.L.R.B. 294. It was not enough for the General Counsel merely to allege

and prove that the Petitioner refused to bargain collectively about the rent increase at the Silver Bell townsite. The federal cases cited above, and in particular the most pertinent, *National Labor Relations Board v. Bemis Bro. Bag Co.*, 206 F.2d 33 (C.A. 5, 1953), require that sufficient evidence be presented to show that the rental of houses is a mandatory subject of collective bargaining under Section 8(a)(5) of the Act, Section 158(a)(5), Title 29, U.S.C.A. These cases destroy any theory that company housing is, *ipso facto,* a mandatory subject of collective bargaining.

CONCLUSION

Petitioner respectfully submits, for all the foregoing reasons, that the order of the Board should be set aside and made of no force and effect and that the Board be ordered to issue an order that:

A. Petitioner did not violate Sections 8(a)(5) and (1) of the Act, Sections 158(a)(5) and (1), Title 29, U.S.C.A.;

B. That the rental of company housing by Petitioner at the Silver Bell, Arizona, facility was not a mandatory subject of collective bargaining under Sections 8(a)(5) and 8(d) of the Act; Section 158(a)(5) and 8(d), Title 29, U.S.C.A.; and

C. That the rental of said housing does not constitute wages and/or other conditions of employment under Section 8(a)(5), 8(d) and 9(a) of the Act, Sections 158(a)(5), 158(d) and 159(a), Title 29, U.S.C.A., respectively.

Respectfully submitted,

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I certify that in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, 28 U.S.C.A., and that, in my opinion, the foregoing Brief is in full compliance with those rules.

JOHN F. BOLAND, JR.